SUPREME COURT, U. S.

JUN 21 1965

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 274

HELEN MASCUILLI, Administratrix of the Estate of Albert Mascuilli, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

No.

HELEN MASCUILLI, ADMINISTRATRIX OF THE ESTATE OF ALBERT MASCUILLI, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Helen Mascuilli, Administratrix of the Estate of Albert Mascuilli, Deceased, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled matter on March 24, 1966.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 241 F. Supp. 354 (Appellant's Appendix, 215a). The opinion of the Court of Appeals for the Third Circuit is reported at — F. 2d — (*infra*, p. 1a). The order of the Court of Appeals for the Third Circuit on the Petition for Rehearing, unreported, appears *infra*, p. 4a.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 31, 1966 (*infra*, p. 3a). The order denying rehearing was entered on March 24, 1966 (*infra*, p. 4a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Where the safety devices on a ship's loading gear are set at one and a half and three times in excess of the safe working load of the ship's gear and fail to arrest the electric current when the strain exceeded the safe working load of the gear, was the vessel not unseaworthy and the owner liable for the death of a longshoreman resulting from the fractured gear under the principle of law enunciated by this Court in *Crumady v. "Joachim Hendrik Fisser"*, 358 U. S. 423 (1959), wherein this Court held that where a dangerous condition due to the excess setting of the ship's safety devices is brought into play by the negligent operation of the stevedores, the resulting injuries must be deemed due to the unseaworthiness of the vessel?

2. Did the Court below err in failing to follow the principle of law enunciated by the Second Circuit,[1] the Fourth Circuit,[2] and the Ninth Circuit,[3] holding that a dangerous condition caused by the stevedore's negligent handling of proper equipment renders the vessel unseaworthy and its owner liable for the resulting injuries?

3. Where the longshoremen charged with creating the unseaworthy condition aboard the vessel are found by the trial court to be "not equal in disposition and seamanship to the ordinary men in the calling", should not the vessel have been held to be unseaworthy and the shipowner liable for the death resulting from that condition, under the decision of this Court in *Boudoin v. Lykes Bros.*, 348 U. S. 336 (1955).

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1. *Grillea v. United States*, 232 F. 2d 919 (1956); *Reid v. Quebec Paper Sales and Transportation Co.*, 340 F. 2d 34 (1965); and *Norfleet v. Isthmian Lines*, 355 F. 2d 359 (1966).

2. *Scott v. Isbrandtsen Co.*, 327 F. 2d 113 (1964).

3. *Blassingill v. Waterman S. S. Corp.*, 336 F. 2d 367 (1964).

STATEMENT OF THE CASE.

The undisputed facts show that petitioner's decedent, a longshoreman, was killed while employed by a stevedoring company aboard the S/S "Marine Fiddler", a cargo vessel owned by respondent. He left surviving him a widow and four minor children. The vessel had been fitted with special newly-developed heavy lift equipment, which features a complicated system of four guy lines, or vangs attached to the cargo hook pendant, to move the cargo and the heavy lift boom in a horizontal plane (14a, 15a, 40a, 56a, 104a, 190a). On other vessels, the boom is moved by two guy lines attached to the boom itself (21a, 85a, 135a). None of the longshoremen working aboard the vessel had ever seen or used such heavy lift equipment previously (136a, 15a, 21a, 52a), and this was known to the ship's officers (97a). Therefore, the equipment had been rigged by ship's personnel (97a) and a ship's officer was present supervising the longshoremen's operations (108a, 131a-132a, 140a-141a, 201a).

The longshoremen had started loading a cargo of heavy military tanks at 11:00 A. M. At 5:00 P. M., the ninth tank had been moved across the deck, was stopped to permit the carpenters below to complete their preparations, and was then lowered. Just as the bottom of the tank track passed below the hatch coaming, the port shackle suddenly broke with a loud report, and the vang lines recoiled and whipped back, mortally striking decedent who was at his position, near the after end of the hatch (45a, 63a, 77a, 89a).

The electric winch for each vang was rated at fifty horsepower or *183* amperes (148a), but each had an overload circuit breaker set to trip at *275* amperes and had to be manually reset (148a-149a, 151a), and the overload relay in the controller was set to trip at *550* amperes (149a). After the accident, examination revealed that none of these cir-

cuit breakers had operated despite the excessive strain that had been exerted sufficient to actually break the shackle (151a).

On the basis of pleadings and pre-trial admissions, Judge Harold K. Wood granted petitioner's motion for judgment on admitted facts, and, upon stipulation, the issue of damages was submitted to Judge John W. Lord, Jr., who awarded damages of $124,000.00. Respondent appealed, and the Court of Appeals reversed and granted a new trial (313 F. 2d 764). The case was tried again before Judge Ralph C. Body (without jury), who found that the accident was caused by the failure of the longshoremen to follow proper loading procedures, in that they permitted the forward and after vangs or guys to be simultaneously taut (221a). This, he stated, caused a dangerous condition known as "tightlining", upon which the exertion of any additional force would be sufficient to break the shackle. This did occur when, after a momentary stopping, the boom was moved again, superimposing further force on the tightline condition, breaking the shackle (221a-222a, 227a-230a). Judge Body failed to take into consideration the failure of the circuit breaker to shut off the power when the strain exceeded the safety limit of the gear. This was identical to the situation in *Crumady v. "Joachim Hendrik Fisser"*, 358 U. S. 423, 3 L. Ed. 2d 413 (1959), where the Court held the vessel unseaworthy and the owner liable when the ship's loading equipment, with a safety cut-off device set at higher than the tackle capacity failed to shut off the power and permitted the shackle to break when the negligent operation by the stevedores placed excessive strain on the gear.

In addition, in the case at bar, Judge Body found (236a) that the longshoremen being without any experience with this new equipment and using it in a manner which was admittedly dangerous, were not "equal in disposition and seamanship to the ordinary men in the calling", as a result of which the accident occurred. That finding of fact in-

dependently required the conclusion that the vessel was unseaworthy on the basis of this Court's decision in *Boudoin v. Lykes Bros.*, 348 U. S. 336 (1955).

Despite the undisputed facts and findings as above stated, the trial judge exonerated respondent on the ground that the negligence of the stevedore contractor caused the accident, and he ignored completely the Supreme Court's decision in *Crumady*, under identical facts, holding the shipowner liable. Notwithstanding his own order dismissing the libel, the trial judge drastically reduced the damage award, which had been fixed by Judge Lord (without jury) in the earlier trial, presumably upon the contingency that his order of dismissal might be reversed.

The Court of Appeals affirmed Judge Body's order of dismissal without discussion or consideration of the principles involved.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I. The Finding of the Court Below That the Unsafe Condition Resulting From the Negligent Use of the Ship's Gear Did Not Render the Vessel Unseaworthy and Liable for the Death of a Longshoreman Is in Direct Conflict With the Decision of This Court in Crumady v. "Joachim Hendrik Fisser", 358 U. S. 423 (1959), Wherein This Court Held That a Dangerous Condition Due to the Excess Setting of the Ship's Safety Devices Which Was Brought Into Play by the Negligent Operation of the Stevedores Renders the Vessel Unseaworthy and the Shipowner Responsible for the Resulting Death of the Longshoreman.

The undisputed facts in this case reveal, just as in *Crumady v. "Joachim Hendrik Fisser"*, 358 U. S. 423, 3 L. Ed. 2d 413 (1959), that the ship's loading gear was equipped with cut-off devices, or circuit breakers, which had been improperly set to cut the power at a point of strain which was much higher than the equipment itself was designed to take. In *Crumady*, the device had been set twice the safe working load of the lifting gear; here, there were two devices, one set at one and one-half times and the other at three times the safe working load of the gear. Further, as in *Crumady*, with this dangerous setting, the stevedores operated the equipment in such a manner as to create great and excessive strain on the gear, and, when the safety device failed to cut off the power, the gear fractured and caused the tragedy which ensued. In *Crumady*, the timbers being raised were negligently permitted to become wedged under the coaming, and the winch power was increased without control until, pulling against an immovable object, the gear broke. Here, the stevedores improperly permitted excessive stress on the vang lines, and the winches, uncontrolled, continued to increase the

strain, until the shackle actually parted, and decedent was struck dead. Indeed, in the instant case, *an examination of the gear afterward indicated that neither of the two circuit breakers connected with the lift or the winches had even operated.*

In *Crumady*, the District Court had held the vessel unseaworthy, but the Court of Appeals for the Third Circuit held there, as it did here, that the sole cause of the injury was the negligence of the stevedores and that the vessel was not unseaworthy. This Court reversed, holding that, although the unsafe condition of the cut-off device was brought into play by the negligent action of the stevedores, the vessel must nevertheless be deemed to be unseaworthy and her owner liable for the consequences.

Mr. Justice Douglas, speaking for the Court, emphasized that the loading and unloading equipment, although in inherently good condition, was rendered, nevertheless, dangerous for its task because its "cut-off device" was improperly set to operate only *after* the load had exceeded the safe working load of the gear (U. S. at 425-26, L. Ed. at 416). This Court then reviewed the obligations of the shipowner to provide a seaworthy vessel to stevedores, which duty is non-delegable;[4] pointing out that unseaworthiness extends to the crew,[5] and to ship's appliances, as well as to the vessel itself, and that they must be maintained in a seaworthy condition;[6] and that the shipowner is not relieved of these responsibilities by "turning control" of loading or unloading over to a stevedoring company (U. S. at 426-27, L. Ed. at 416-17). Citing *Grillea v. United States*, 232 F. 2d 919 (2nd Cir. 1956), to note that "stevedores themselves could render a ship pro tanto unseaworthy and make the vessel owner liable for injuries to one of them", the opinion states that under the facts at hand (identical with the in-

4. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 95, 90 L. Ed. 1099, 1106.

5. *Boudoin v. Lykes Bros. S.S. Co.*, 348 U. S. 336, 99 L. Ed. 354.

6. *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 88 L. Ed. 561.

stant case), we need not go that far, since the facts demonstrate that the stevedores "did no more than bring into play the unseaworthy condition of the vessel". The winch, although not inherently defective, was an appurtenance of the vessel which was adjusted by these acting for the owner in a way that made it dangerous for the work at hand. Therefore, this Court said, the appurtenance, and, thus, the vessel, was unseaworthy and the shipowner liable for the results of that condition (U. S. at 427-28, L. Ed. at 417). The decision in the instant case is in flat conflict with *Crumady*, which encompasses the same principles of law, and the same antecedent facts and operating events. Such specific conflict with the mandate of this Court must be reviewed and reversed.

II. The Decision of the Court Below in Holding That an Unsafe Condition Resulting From the Negligent Use by the Longshoremen of the Ship's Equipment Does Not Render the Vessel Unseaworthy Is in Direct Conflict With the Decisions of the Second Circuit in Grillea v. United States, 232 F. 2d 919 (1956); Reid v. Quebec Paper Sales and Transportation Co., 340 F. 2d 34 (1965); and Norfleet v. Isthmian Lines, 355 F. 2d 359 (1966); the Fourth Circuit in Scott v. Isbrandtsen Co., 327 F. 2d 113 (1964); and the Ninth Circuit in Blassingill v. Waterman S. S. Corp., 336 F. 2d 367 (1964), Which Hold That a Dangerous Condition Caused by the Stevedores' Negligent Handling of Proper Equipment Renders the Vessel Unseaworthy and Its Owner Liable for the Resulting Injuries.

Even if we should ignore the existence of the underlying unseaworthiness due to the improperly set circuit breakers and winch controls, and we should assume that the equipment was seaworthy, the negligent use of this equipment by the stevedores, creating the dangerous "tightline" condition rendered the vessel pro tanto unseaworthy and

the shipowner liable for the results thereof. This was specifically discussed in *Crumady*, where this Court cited with approval the decision of the Second Circuit in *Grillea v. United States*, 232 F. 2d 919 (2 Cir. 1956). In stating that the vessel's equipment was seaworthy throughout the loading operations and that "the accident was caused solely by the negligent operation of the stevedoring crew" the Court below stated a factual situation which demanded, as a matter of law, a holding that the vessel was thus unseaworthy and the shipowner responsible therefor. The Court's failure so to hold not only conflicts with the statement by this Court in *Crumady*, but, also, with the consistent decisions of other Circuits, including the Second, Fourth and Ninth.

In *Grillea v. United States*, 232 F. 2d 919, 922-23 (2 Cir., 1956), a vessel, otherwise safe, was held to have become unseaworthy solely by the action of the injured party. There, the injured longshoreman had placed the wrong hatch cover over a pad-eye shortly before he stepped on it and it gave way. In *Reid v. Quebec Paper Sales and Transportation Co.*, 340 F. 2d 34, 35-36 (2 Cir., 1965), the ship was held unseaworthy and the shipowner liable, where a longshoreman was injured by a falling ladder which had been insecurely placed by a fellow longshoreman. The Court pointed out that, no matter who had placed the ladder, the shipowner had the "ultimate obligation" to see that it was properly placed (36).

More recently, in *Norfleet v. Isthmian Lines*, 355 F. 2d 359 (2 Cir., 1966), a pad-eye attached to the boom of the vessel broke during a loading operation, the testimony showing that the longshoreman operated the winch improperly, causing a "tightlining" as in the instant case, with resultant extreme pressure, breaking the pad-eye and injuring a longshoreman. The Court confirming the *Grillea* doctrine, then held that "even if an unseaworthy condition had been created by a negligent act of a fellow longshoreman, the shipowner may still be liable" (363-64), since his obligation in this regard is absolute, non-delegable and continuing.

In *Scott v. Isbrandtsen Co.*, 327 F. 2d 113 (4 Cir., 1964), a longshoreman was injured because of the negligent manner of unloading cargo used by his fellow longshoremen. The Court held that negligence of the longeshoremen themselves in the performance of the ship's work and in their method of operation causing a dangerous condition renders the vessel unseaworthy and the shipowner liable for injury to a longshoreman resulting therefrom (123-26).

In *Blassingill v. Waterman Steamship Corp.*, 336 F. 2d 367 (9 Cir., 1964), a longshoreman was injured when struck by a piece of cargo because of the unsafe method in which he and other longshoremen were unloading the vessel. The Court held that the employment of an unsafe method of unloading rendered the vessel unseaworthy.[7]

Indeed, other panels of the Third Circuit have, contrary to the instant case, below, been in agreement with the other Circuits.[8] In *Ferrante v. Swedish American Lines*, 331 F. 2d 571 (3 Cir., 1964), longshoremen negligently discharged plywood in a rope sling which they overloaded, despite the warning of the ship's officer against big loads. The panel[9] held, per Kalodner, J., that although the rope sling was itself seaworthy, the longshoremen's faulty method of operation and use of this equipment rendered the vessel unseaworthy and the shipowner liable. In *Thompson v. Calmar Steamship Corp.*, 331 F. 2d 657 (3 Cir., 1964), longshoremen, loading steel aboard ship from railroad cars, used lines from the ship's winches to move the railroad cars and did so in a dangerous manner injuring one of the longshoremen. The Court held that the longshoremen's improper method of operation rendered the vessel unseaworthy although the equipment itself was proper.[10] The shipowner's

7. In that case, the Court cited dictum of this Court in *Morales v. City of Galveston*, 370 U. S. 165, 8 L. Ed. 2d 412 (1962) supporting this doctrine.

8. The Third Circuit panel in the instant case consisted of Judges McLaughlin, Hastie and Smith.

9. Judges Kalodner, Staley and Smith.

10. The panel: Circuit Judges Staley and Ganey, and District Judge Nealon.

petition for rehearing was denied, per curiam, but two of the Judges[11] (who were also on the three-judge panel in the instant case) dissented, refusing as in the instant case to apply the now generally settled principle of operational unseaworthiness (663).

Thus, we have a singular conflict between the instant decision below and the other circuits, and a split within the Third Circuit, itself, upon the principle involved, requiring review by this Court upon this vital and extremely important question of law.

III. Where the Court Below Found That the Longshoremen Charged With Creating the Unseaworthy Condition Aboard the Vessel Were Found by the Trial Court to Be "Not Equal in Disposition and Seamanship to the Ordinary Men in the Calling", the Court Below Should Have Concluded That the Vessel Was Unseaworthy and the Shipowner Liable for the Resulting Death Under the Decision of This Court in Boudoin v. Lykes Bros. S. S. Corp., 348 U. S. 336 (1955).

After finding that the accident was caused by failure of the longshoremen to use proper loading procedure, the trial judge held that "the longshoremen crew was not 'equal in disposition and seamanship to the ordinary men in the calling' " at the time of the accident (Conclusion No. 17; 236a). As a matter of law, this finding required the conclusion that the vessel was, for this reason alone, unseaworthy. *Boudoin v. Lykes Bros. S. S. Corp.*, 348 U. S. 336, 99 L. Ed. 754 (1955). Since the incompetence of a seaman constitutes unseaworthiness, the incompetence of a stevedore doing the seaman's work similarly renders the vessel unseaworthy.[12] Failure of the Court below to so conclude, upon these findings, conflicts directly with this Court's decision in *Boudoin*.

11. Judges Hastie and Smith.

12. *Smith v. Lauritsen*, 201 F. Supp. 663 (E. D. Pa. 1962); affd. 3 Cir., February 9, 1966, No. 14941.

CONCLUSION.

The decision below, under undisputed facts, is in direct conflict with the settled doctrine of this Court, and, in addition, raises a sharp conflict among the Circuits, as well as within the Third Circuit itself. The factual situation is of frequent occurrence, as witness the cases which have come through the Circuits. The decision below, if not reversed, will, contrary to the mandates of this Court, seriously dilute the rights of longshoremen in their daily routine and will prevent the uniform application of the decision of this Court.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted to the end that the decision below be reversed.

Respectfully submitted,

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MARTIN J. VIGDERMAN,
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Counsel for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15427

HELEN MASCUILLI, ADMINISTRATRIX OF THE ESTATE OF ALBERT MASCUILLI, DECEASED,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued December 17, 1965

Before McLAUGHLIN, HASTIE and SMITH, *Circuit Judges*

OPINION OF THE COURT
(Filed January 31, 1966)

PER CURIAM.

This case is before us for the second time. In our judgment, upon consideration of the whole record, including, inter alia, appellant's thorough statements of her view of the questions involved, the findings of fact by the trial

court that the vessel and its equipment were in a seaworthy condition at all times throughout the loading operations and that the accident was caused solely by the negligent operation of the stevedoring crew as stated in finding of fact #35, are not clearly erroneous. We find that the error, if any, is clearly not substantial in the references to the signal man, Majdowski in the trial findings of fact and conclusions of law. We have examined appellant's point with reference to the trial court's reassessment of damages. There is no necessity or use of our passing upon that argument.

The judgment of the district court will be affirmed.

APPENDIX B.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 4, 1965, be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

January 31, 1966

APPENDIX C.

SUR PETITION FOR REHEARING

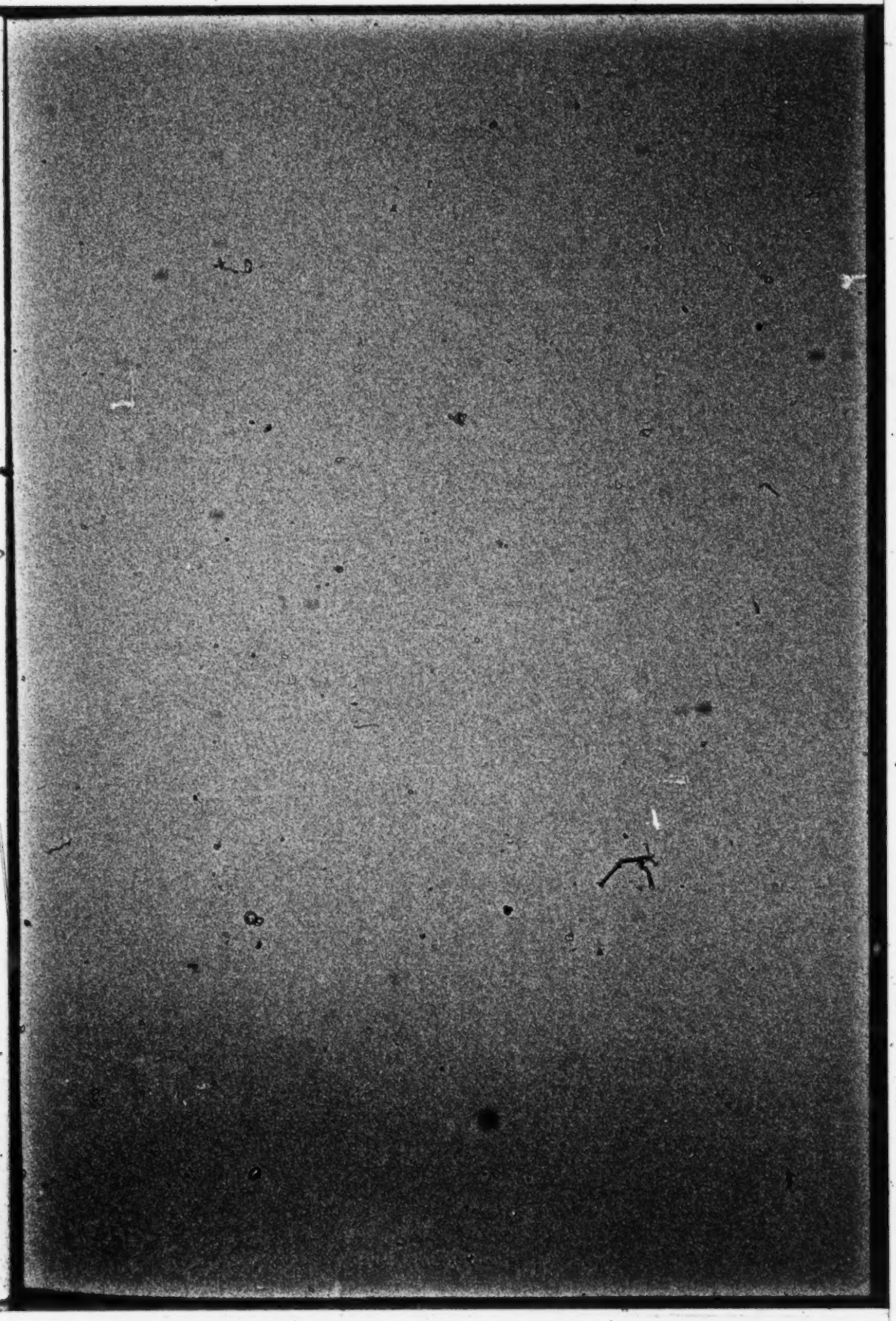
Present: KALODNER, Chief Judge, and McLAUGHLIN, STALEY, HASTIE, GANEY, SMITH and FREEDMAN, Circuit Judges

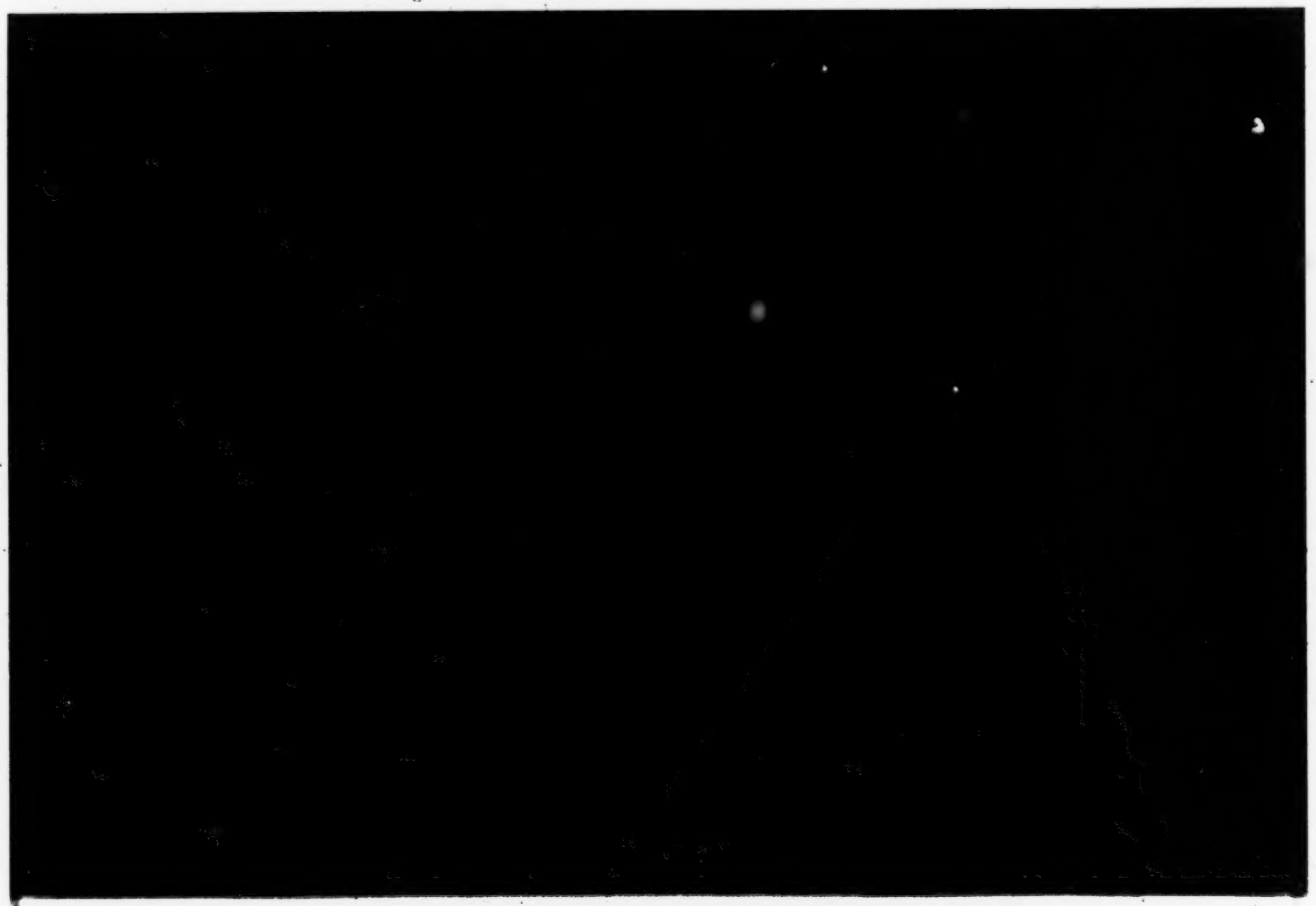
The petition for rehearing filed by the appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

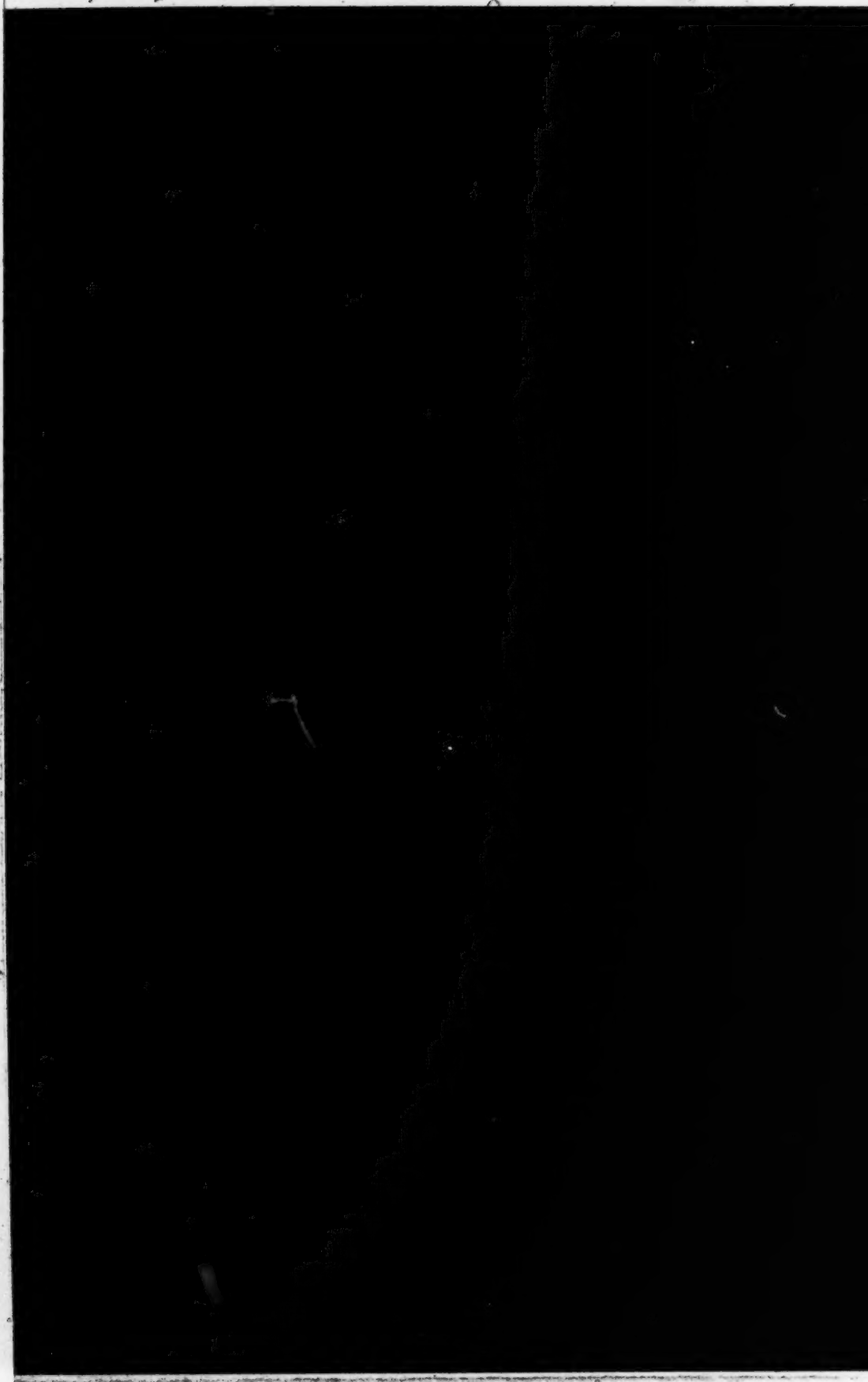
By THE COURT,

McLAUGHLIN, *J.*

Date: March 24, 1966







In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 274

HELEN MASCUILLI, ADMINISTRATRIX OF THE ESTATE OF ALBERT MASCUILLI, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–2a) is reported at 358 F. 2d 133. The opinion of the district court (215a–238a) is reported at 241 F. Supp. 354.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1966 (Pet. App. 3a), and a timely petition for rehearing was denied on March 24, 1966 (Pet. App. 4a). The petition for a writ of certio-

[1] References "a" and "App." are, respectively, to "Appendix for Appellant" and "Appendix for the United States" filed in the court of appeals. These appendices have been filed by petitioner in this Court.

225-296—66

rari was filed on June 21, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the vessel on which the accident occurred was unseaworthy either because the winch cut-offs were improperly set or because the negligence of the longshoring crew rendered the vessel unseaworthy as a matter of law.

STATEMENT

Petitioner commenced this admiralty suit against the United States for damages on account of the death of Albert Mascuilli, an employee of Northern Metals Company, a stevedore contractor. The decedent was accidentally killed on May 1, 1959, while working as a longshoreman aboard the U.S.N.S. MARINE FIDDLER, a heavy-lift cargo vessel owned and operated by the United States. On the day of the accident, Northern Metals' longshoremen were loading 61¼-ton Army combat tanks into the vessel's No. 3 hatch, using a swinging jumbo boom capable of handling up to 150 tons of cargo (216a–217a).[1] The vessel's loading gear functioned according to ordinary stevedoring principles, and its rigging arrangements were similar to those used on other vessels (App. 182–183).[2] The longshoring crew, of which petitioner's decedent was a member, contained experienced winchmen, and had been instructed in the use of the vessel's winches and

[1] Diagrams 1 and 2, *infra*, pp. 3-5, illustrate the operation and rigging of the heavy-lift boom.

[2] The design, drawings and specifications for the MARINE FIDDLER's heavy lift gears had been approved by the American Bureau of Shipping (App. 180–181).

the operation of its heavy-lift gear (31a, 83a, 86a–87a; App. 81–82). That crew's [illegible] foreman assured the vessel's chief mate that his crew was experienced and understood the operation of the MARINE FIDDLER's gear, having previously worked the ship (130a). The longshoremen were checked out on the proper operation of the vessel's loading gear, and several times during the day's operations were warned against tightlining—*i.e.*, permitting the vessel's after port and forward starboard vangs[*] to become simultaneously taut (120a–121a, 134a; App. 81).

Northern Metals' longshoremen successfully lifted and stowed eight tanks into hatch No. 3, thereby demonstrating that they understood and could handle capably the vessel's gear (220a; App. 81–82, 84, 90). The longshoremen then raised the ninth tank from the pier and brought it onto the deck in order to clear a space in the hold. They next moved the tank over the square of the hatch, and had partially lowered it into the hold when the shackle connecting the after port vang spreader to the flounder plate on the end of the boom suddenly, and without warning, parted, causing the port vang and its rigging to recoil and fatally strike petitioner's decedent, who was working on deck as a tag line tender (see 220a–221a; Diagrams 1–2).

After a trial before the court, sitting without a jury, judgment in favor of the United States and against petitioner was entered (237a). The court,

[*] Vangs are guy lines, designed only to swing the boom horizontally; they do not support the weight of the cargo (219a–220a).

in its detailed Findings of Fact and Conclusions of Law, ruled that (230a):

> * * * the vessel and all of its equipment was in a seaworthy condition at all times, and remained so throughout the entire loading operations. The accident was caused solely by the negligent operation of the stevedoring crew using seaworthy equipment in such a manner as to cause the accident to occur so instantaneously that the Third Officer was unable to warn anyone or prevent its happening.

The court of appeals, "upon consideration of the whole record, including, inter alia, [petitioner's] thorough statements of her view of the questions involved," affirmed (Pet. App. 1a–3a).

ARGUMENT

The district court determined that the shackle parted solely because Northern Metals' longshoremen failed to comply with proper operating procedures—specifically that the directions of the company's signalman-foreman were either not proper or were ignored by the winchmen (227a–230a). The court of appeals held that the district court's findings of fact were not clearly erroneous (Pet. App. 1a–2a). We submit that there is no issue warranting further review.

1. Petitioner argues that the MARINE FIDDLER was unseaworthy because its winch cut-offs were improperly set and therefore failed to prevent excessive strain on the shackle (Pet. 6–8). She cites no evidence to support this theory. The district court found that the winch cut-offs, which were not designed to prevent the type of accident that occurred here, were seaworthy (225a–227a, 234a). The finding

is fully supported by the evidence—including undisputed expert testimony that the settings of the winch cut-offs were proper and sound for use in the vessel's rig (App. 145–146, 148–149).

None of the winch cut-offs at hatch No. 3, however set, could have prevented the excessive strain on the after port shackle (App. 158–159). At the time of the accident, both the after port and forward starboard vangs were taut, thereby creating a tightline condition along a line in which the shackle was a link (Diagram 2). The after port vang winch was set at paying-out position "1" (App. 38); the forward starboard winch had just ceased heaving in and was in neutral; and the after starboard winch was set at heaving-in position "2". Neither the after port winch's cut-offs nor those of the forward starboard winch could trip in these positions (App. 119–120, 140–142, 150–152), and the after starboard winch's cut-offs—which were in good working order (App. 114–115)—could not have prevented or even measured the force which that winch was creating along the tightline. Indeed, there was no known safety device that could have prevented this accident (222a; App. 158–159, 216).

Since the MARINE FIDDLER's winch cut-offs were properly set, were sound for use in the rig and had no causal relation to the accident, which was caused my a lack of attentive and coordinated operation of the winches (230a; App. 158–159, 216), petitioner's reliance upon this Court's decision in *Crumady* v. *The Joachin Hendrik Fisser,* 358 U.S. 423 (Pet. 6–8), is misplaced. The evidence in that case established that the winch that served the J. H. FISSER's boom was improperly set and rendered the vessel unseaworthy.

2. Petitioner next contends that the stevedoring crew's negligence, which caused the death of her decedent, rendered the vessel unseaworthy (Pet. 8–11). In the circumstances of this case, such conclusion is, we submit, unwarranted.

The accident occurred because the longshoremen negligently permitted a tightline condition to develop along the after port and forward starboard vangs. The vessel's third mate was observing the loading operations, but was unable to prevent the tightline condition because it happened suddenly and without warning; he had no time to warn or instruct the winchmen or the signalman-foreman before the accident occurred (220a–221a, 230a). In these circumstances, the courts below correctly held that the vessel did not become unseaworthy on account of the longshoremen's momentary mishandling of seaworthy equipment. None of the cases cited on pages 8–11 of the Petition hold to the contrary. Indeed, in one of them—*Norfleet* v. *Isthmian Lines, Inc.*, 355 F. 2d 359 (C.A. 2)—the court ruled expressly that if the longshoreman's injury resulted from negligent mishandling of a seaworthy appurtenance, and if the injury occurred before any unseaworthy condition arose, the shipowner would not be liable in an action based on breach of the warranty of seaworthiness. 355 F. 2d at 364.

3. Finally, petitioner argues (Pet. 11) that the district court was required to hold the MARINE FIDDLER unseaworthy on the basis of its determination that (236a):

> The longshoremen crew was not "equal in disposition and seamanship to the ordinary men in the calling" at the time the ninth tank was being loaded.

Petitioner has misread this statement. The record establishes that the longshoremen were experienced, had been instructed in the use of the winches and the operation of the heavy-lift gear, had been warned of the dangers in tightlining, and had successfully loaded eight tanks before the accident occurred (11a, 68a, 86a–87a, 130a–131a, 134a; App. 81–82). In these circumstances, and in the light of the district court's findings and conclusions as a whole (see 218a–220a, 227a–230a, 234a–236a), it is clear that the court was not of the view that the longshoremen were incompetent, but found only that they were negligent "at the time the ninth tank was being loaded." As this Court's opinion in *Boudoin* v. *Lykes Brothers Steamship Co.*, 348 U.S. 336, makes clear, a single act of negligence by otherwise competent longshoremen would not in itself require the conclusion they were unequal in seamanship to the ordinary men of the calling. 348 U.S. at 339–340. Were that the rule, the shipowner would be absolutely liable for any negligent act of longshoremen in connection with loading or unloading the vessel.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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JULY 1966.

APPENDIX

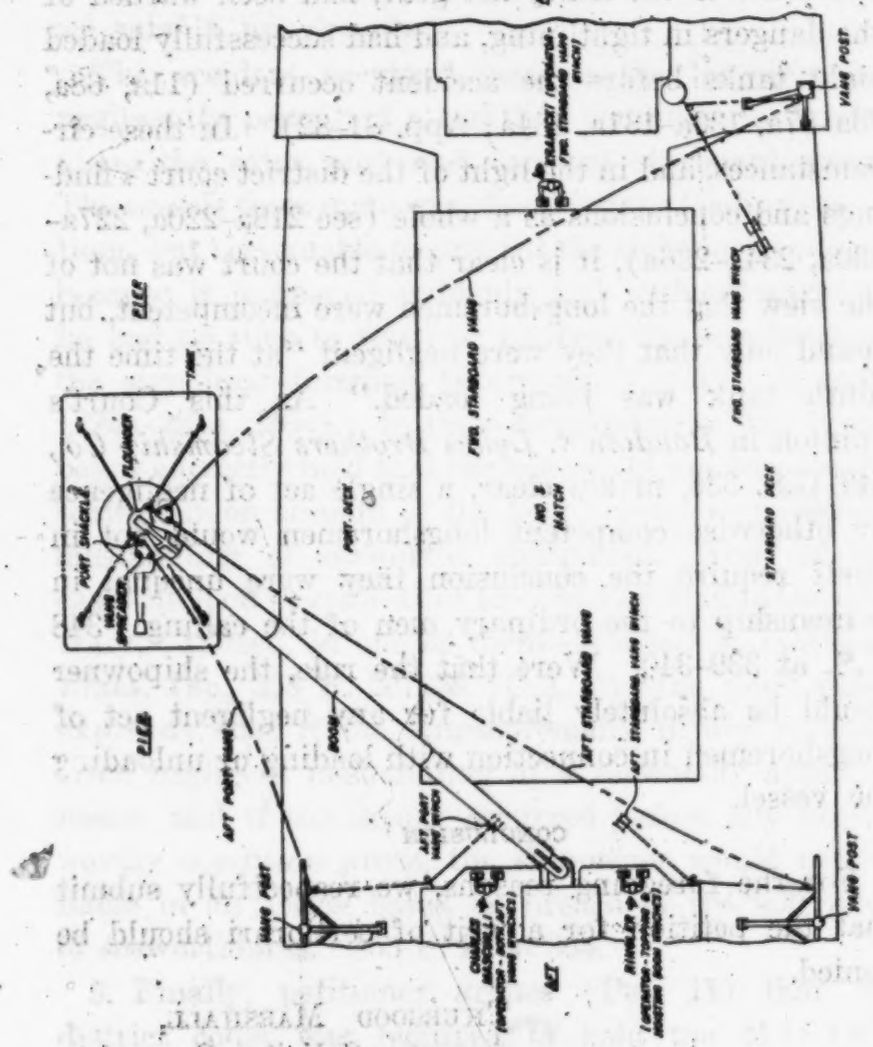

DIAGRAM 1.—*Pier loading position.*

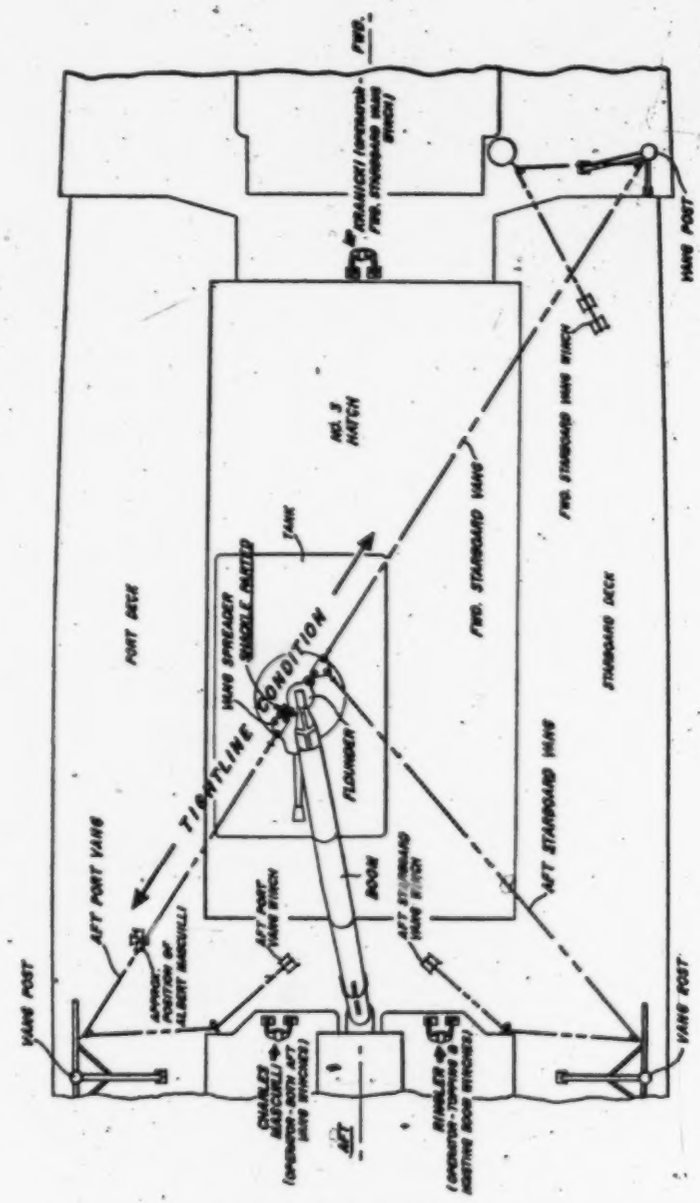

DIAGRAM 2.—*Position before parting.*

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IN THE

Supreme Court of the United States

October Term, 1966.

No. 274.

HELEN MASCUILLI, Administratrix of the Estate of Albert Mascuilli, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONER'S REPLY BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 274.

HELEN MASCUILLI, ADMINISTRATRIX OF THE ESTATE OF ALBERT MASCUILLI, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF.

Respondent, in its reply to the Petition for Certiorari, endeavors to make it appear that in one respect the issues involved a factual controversy and in the other respect that a fact finding by the Court below was "misread" by petitioner. A brief examination of the record demonstrates that respondent is grossly in error in both respects. Petitioner here does not and need not argue the facts. Every fact assumed in the Petition is well established and not controverted in the record. The "fact findings" upon which petitioner relies are not paraphrased or qualified in any manner. The petitioner argues from the literal phraseology of the fact findings and gives them the specific meaning intended by the Court below.

In an effort to escape from this Court's decision in *Crumady v. Joachim Hendrik Fisser*, 358 U. S. 423, 3 L. Ed. 2d 413 (1959), respondent states that petitioner cited no evidence to support the theory that the winch cut-offs were improperly set and, therefore, failed to prevent excessive strain (Resp. Brief, p. 4). But, the evidence demonstrates *without any controversion* whatever that while the electric winch for each vang was rated at 183 amps. (50 horsepower) (148a), nevertheless, the overload circuit breaker on each was set to trip at 275 amps. (148a-149a, 151a), and the overload relay in the controller was set to trip at 550 amps. (149a). Thus, the so-called "safety" devices, as they had been set, were wholly useless because this "safety" setting of the circuit breaker was far in excess of the admitted safe working load of the equipment. These devices were examined after the accident and, of course, revealed that neither had operated to cut off the power, despite the fact that the strain was irrefutably excessive to the point that the shackle actually shattered under it (151a). Thus, this case falls squarely under this Court's decision in *Crumady*.

Respondent argues also that the negligent use by the longshoremen of ship's equipment, which caused the dangerous condition aboard the vessel, did not render the vessel unseaworthy. Respondent's position on this is that the ship's officer who, admittedly, was supervising the entire operation, had no time to warn the longshoremen of the existence of the dangerous "tightline" condition since it happened so "suddenly" and was the result of the longshoremen's "momentary" mishandling of the equipment (Resp. Brief, p. 6).

Respondent obviously confuses "momentary" *mishandling* with "momentary" dangerous condition. The dangerous condition which resulted from the mishandling was the unseaworthiness which caused the accident, and lasted as long as was necessary to cause the shackle to break, killing decedent. It takes only a moment to place

a wrong hatch cover over a padeye (see *Grillea v. United States*, 232 F. 2d 919, 922-23 (2nd Cir. 1956)); or to place a ladder on an unsteady footing (see *Reid v. Quebec Paper Sales and Transportation Company*, 340 F. 2d 34, 35-36 (2nd Cir. 1965)). Indeed, most accidents occur from a "momentary" misstep, and the dangerous condition which results therefrom need only last sufficiently long to be the cause of the injury. Respondent's argument would have this Court place liability for unseaworthiness in the same position as liability for negligence.

Of the cases cited by petitioner, all of which fully support her position, respondent has singled out *Norfleet v. Isthmian Lines, Inc.*, 355 F. 2d 359 (2nd Cir. 1966), stating that, there, the court said that if injury resulted from negligent mishandling of a seaworthy appurtenance and "if the injury occurred *before* any unseaworthy condition arose", the shipowner would not be liable in an action based on unseaworthiness. Obviously, this is the law (stated as part of a discussion of the general proposition, and after emphasizing the law as we have stated it). But, clearly, that was not the circumstance in *Norfleet*, nor in the instant case. In *Norfleet*, the "tightline" condition occurred (rendering the vessel unseaworthy) and, then, the padeye broke, causing the injury. The court reversed the decision below, which had dismissed the case, and remanded the case for new trial on plaintiff's appeal. In the instant case, the "tightline" condition occurred and, thereupon, and as a result thereof, the shackle shattered. Thus, the injury occurred *after* and *as a direct result of* the "tightlining". Indeed, physically, the deadly vang line could have re-coiled only *after* both events, rendering the vessel unseaworthy, had occurred.

Significantly, respondent refrains from any reference to the decisions from the other circuits, precisely on the point and in direct conflict with the decision below on this specific issue.

In order to avoid the decision of this Court in *Boudoin v. Lykes Bros.*, 348 U. S. 336 (1955), respondent argues that petitioner had "misread" the specific finding by the District Judge that the longshoremen were not "*equal in disposition and seamanship to the ordinary men in the calling*" (Resp. Brief, p. 7). The bare fact is that *the court found just that, and in those words* (Conclusion No. 17; 236a). The language of the District Judge was clear, unequivocal and without doubt. Under that conclusion, as a matter of law, the vessel was unseaworthy under the *Boudoin* decision.

It is respectfully submitted that certiorari should be granted to review and reverse the decision of the Court below.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

MASCUILLI *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 274. Decided May 22, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is reversed. *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96; *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423.

MR. JUSTICE HARLAN, MR. JUSTICE STEWART, and MR. JUSTICE WHITE are of the opinion that certiorari should be denied.